sponte nature of the court's decision; 2) the fact that the summary judgment was the result of the court's own decision to revisit the defendant's motion; and 3) the unfairness to Emmanuel resulting from the of granting the motion without providing any notice to Emmanuel or any opportunity to respond. *Id.* at 13a-29a. The court also did not address in any manner Emmanuel's April 26, 2004, motion for reconsideration under Rule 59(e). *Id.*

Emmanuel filed a timely notice of appeal from the district court's May 20, 2004, memorandum and order. App. to First Circuit Brief, 30 (Docket entry of 6/21/04). However, because the district court had not ruled on Emmanuel's Rule 59(e) motion, the notice of appeal did not become effective until the district court entered an electronic order denying the Rule 59(e) motion without reasons on October 27, 2004. *Id.* (Docket entry of 10/27/04).

On appeal, the First Circuit Court of Appeals addressed the merits of the district court's memorandum order granting summary judgment, but the court did not address or acknowledge in any way the unique procedural posture of the case or the propriety of the district court's *sua sponte* revisitation of its initial denial of summary judgment and subsequent reversal of that decision five months later and entry of a new order granting summary judgment. App. 1a-11a. Instead, the First Circuit merely set out the relevant summary judgment standards and held that the district court did not err in its determination that the Union did not violate its duty of fair representation. *Id.* at 5a-9a.

The First Circuit did address the district court's perfunctory denial of Emmanuel's motion for reconsideration, ruling that the denial did not amount to an abuse of discretion because "Emmanuel has offered no persuasive reason for waiting until after the entry of judgment to search the internet for publicly available documents that could have supported his claim." *Id.* at 9a-11a. Of course, as is evident from the summary of the proceedings, the First Circuit misstated the order of events since Emmanuel's discovery on the internet of the favorable evidence occurred *after* the district court had initially denied the defendant's summary judgment motion and *before* the district court decided to revisit, and grant, the defendant's motion.

Emmanuel filed a timely petition for panel rehearing, specifically taking issue with the panel's erroneous statement that he had waited until after the entry of summary judgment to search the internet for the new evidence of mechanical defects. Emmanuel argued that, because the district court reversed its earlier decision denying summary judgment and granted the defendant's previously-denied motion for summary judgment four days before trial was to begin, and because the court did so without notice to the parties that the court was even revisiting the issue of summary judgment, the only time he could have presented the district court with his newly-discovered evidence was in the motion for reconsideration. Emmanuel argued that, had the court provided any notice whatsoever that it was revisiting its earlier denial of summary judgment, he would have been able to inform the court of the new evidence at that time.

The First Circuit denied Emmanuel's Petition for Panel Rehearing on November 4, 2005, without providing reasons. App. 41a.

Emmanuel has now brought to this Court his petition seeking a writ of certiorari to the United States Court of Appeals for the First Circuit.

REASONS FOR GRANTING THE PETITION

The district court's procedure in granting summary judgment, as outlined above, violated Due Process and Fed. R. Civ. P. 56 in that, without notice to the parties and without giving the parties an opportunity to present evidence, the district court decided *sua sponte* to revisit its denial of summary judgment five months after the fact and to enter a new order granting summary judgment.

The Due Process Clause of the Constitution prohibits deprivations of life, liberty, or property without "fundamental fairness" through governmental conduct that offends the community's sense of justice, decency and fair play. *Moran v. Burbine*, 475 U.S. 412, 432-34 (1986). The district court's actions in this case in failing to adhere to the Federal Rules of Civil Procedure by deciding *sua sponte* to revisit its denial of summary judgment without providing notice to the parties or an opportunity to respond were fundamentally unfair and resulted in a violation of Petitioner's Due Process rights.

Rule 56 of the Federal Rules of Civil Procedure does not specify whether a district court may *sua*

sponte revisit a previously-denied motion for summary judgment and grant the same motion in the absence of any request by a party to do so. Because rule 56 does not expressly authorize a court to enter summary judgment *sua sponte* against a party, the circuit courts of appeal were split on the issue whether authority for such action existed. *Compare Choudhry v. Jenkins*, 559 F.2d 1085, 1088-1089 (7th Cir. 1977) (holding that summary judgment should not be entered without a party-generated motion); *Kistner v. Califano*, 579 F.2d 1004 (6th Cir. 1978) (holding that it is permissible for a district court to enter summary judgment *sua sponte* so long as it "afford[s] the party against whom summary judgment will be entered advance notice as required by Rule 56 and an adequate opportunity to show why summary judgment should not be granted."); *FLLI Moretti Cereali S.P.A. v. Continental Grain Co.*, 563 F.2d 563 (2d Cir. 1977) (holding that the power to grant summary judgment *sua sponte* "must be exercised with great caution and with care taken to give the parties an opportunity to present materials in opposition.").

In 1986, this Court ruled in *Celotex Corp. v. Catrett* that, as a general rule, a district court lacks the power to grant summary judgment *sua sponte*. *See* 477 U.S. 317, 326 (1986). The Court held that a district court could grant summary judgment *sua sponte* only if the party against whom summary judgment was to be entered had prior notice that the court was considering summary judgment and a fair opportunity to present evidence in opposition to summary judgment. *See id.* Significantly, however, *Celotex* did not involve a *sua sponte* grant of summary judgment by the district court. The issue in *Celotex* was whether defendant Celotex's motion for summary judgment against the

plaintiff should have been granted because the plaintiff had been unable to produce evidence to support her wrongful death claim that her deceased husband had been exposed to Celotex's asbestos products. The Court of Appeals for the District of Columbia had held that Celotex's failure to support its summary judgment motion with evidence negating such exposure precluded summary judgment. *Id.* at 319. In reversing, the Supreme Court discussed at length the requirements of Federal Rule of Civil Procedure 56, including the following reference to a *sua sponte* grant of summary judgment:

> Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgment *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence. It would surely defy common sense to hold that the District Court could have entered summary judgment *sua sponte* in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

Id. at 326 (citations omitted). Thus, although *Celotex* did not itself specifically involve a *sua sponte* summary judgment, the Court's reference to the authority of the district court to so act under limited circumstances has been employed by the First Circuit, among others, in reviewing the propriety of district courts' *sua sponte* grants of summary judgment.

Following *Celotex*, the First Circuit has held that, although "district courts have the power to grant summary judgment *sua sponte*," *Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24, 29 (1st Cir. 1996), *citing Stella v. Tewksbury*, 4 F.3d 53, 55 (1st Cir. 1993), "that power should be exercised sparingly." *Jardines Bacata, Ltd. v. Diaz-Marquez*, 878 F.2d 1555, 1560 (1st Cir. 1989). The First Circuit has said that *sua sponte* summary judgment is a remedy which "should be used with great circumspection," and therefore has placed two caveats on this power, both of which must be satisfied to overcome the general rule that a court may not enter summary judgment *sua sponte*. *Stella*, 4 F.3d at 55.

First, a district court ordinarily may order summary judgment on its own initiative only when discovery is sufficiently advanced that the parties have enjoyed a reasonable opportunity to glean the material facts. *Berkovitz*, 89 F.3d at 29. Second, the court may enter summary judgment *sua sponte* only if it first gives the targeted party appropriate notice and a chance to present its evidence on the essential elements of the claim or defense. *Id.* Proper notice affords parties opposing summary judgment the opportunity to inform the "court precisely what they intend to prove and how, before [the court] can say there are no 'genuine' and 'material' issues of fact." *Stella*, 4 F.3d at 55 (internal citation and quotations omitted). The court has held that the notice requirement for *sua sponte* summary judgment demands at the very least that the parties "(1) be made aware of the court's intention to mull such an approach, and (2) be afforded the benefit of the minimum 10-day period mandated by Rule 56." *Id.* at 56.

The First Circuit has held that these strictures are not peculiar to *sua sponte* summary judgments, but, rather, mirror the general principles that govern all motions for summary judgment. *See Stella*, 4 F.3d at 56 (noting that "it is well settled in this circuit that all summary judgment proceedings, including those initiated by the district judge, will be held to the standards enunciated in Rule 56 itself."). In the First Circuit, this means that the district court must give the targeted party at least ten days within which to proffer affidavits or other evidence in response to the court's specific concerns. *Berkovitz*, 89 F.3d at 30.

At a minimum, the district court's actions in Petitioner's case amounted to a *sua sponte* grant of summary judgment since there was no motion of a party for summary judgment pending at the time (the defendant's eight-month old summary judgment motion having been denied five months previously). As such, under controlling First Circuit precedent, the district court was required to give the targeted party, Petitioner, notice of its contemplated action and at least ten days within which to proffer affidavits or other evidence in response to the court's specific concerns. See Berkovitz, 89 F.3d at 30. The district court's failure to do either in this case was clearly reversible error. *Id.* at 31; *Stella*, 4 F.3d at 56. The panel of the First Circuit reviewing the district court's decision violated the court's own established precedent in upholding the error. As the First Circuit has stated in this context, the appellate court cannot "turn a blind eye to procedural irregularities and focus instead on whether the presence of genuine issues of material fact can be discerned," as it did here. *See Stella*, 4 F.3d at 55.

To the extent that the district court's decision in this case may not technically be deemed a *sua sponte* summary judgment because of the defendant's previously-filed and previously-denied summary judgment motion, the district court's conduct remains improper. Even if the defendant's previously-filed and previously-denied motion were to absolve the district court's decision from being cast as a *sua sponte* summary judgment, the case remains an even more "egregious example of a court, obviously well intentioned, nonetheless unfairly sandbagging litigants." *See Stella*, 4 F.3d at 56. The harm the above line of cases seeks to prevent is the surprise and resultant unfairness to the targeted party of a district court entering summary judgment against that party, on its own motion, without providing the targeted party proper notice and an opportunity to respond. In the circumstances below, Petitioner was surprised by the district court's grant of summary judgment the day after the final pretrial hearing not only because he had been given no notice that the court was considering summary judgment, but because he knew that the district court had already considered the defendant's summary judgment motion several months previously and had, in fact, denied summary judgment. Thus, even if the district court's action may not be considered *sua sponte* so as to trigger the procedural safeguards required for such actions, the rationale behind those safeguards is only more applicable in the circumstances of this case.

In a somewhat-related context, the Fifth Circuit Court of Appeals has held that a significant delay between the time a motion for summary judgment is filed and the court's ultimate disposition of the motion

violates Rule 56(c). *Capital Films Corp v. Charles Fries Productions, Inc.*, 628 F.2d 387, 391-92 (5th Cir. 1980). There, Capital admitted that a motion for summary judgment was filed over a year prior to entry of judgment but argued that subsequent events and actions by the district court induced it to believe the case was going to trial. *Id.* at 391. Capital pointed to the fact that the case had been carried on the jury trial docket for several months and that a pre-trial order in contemplation had been filed by the court only the day before the court entered judgment. *Id.* The Fifth Circuit held that, as a result, Capital had never been put on notice that the district court was considering the defendant's summary judgment motion prior to the court's order granting the motion. *Id.* at 392. The court held that this was error for the same reasons that a district court's *sua sponte* grant of summary judgment would be error – failure to provide the required 10-day notice to the parties and an opportunity to the adverse party to respond. *Id.*

Other circuits have found otherwise, however, holding that a district court is under no particular deadline to rule on a motion for summary judgment and that a delay by itself will not invalidate the ruling. *See Davis v. City of Charleston, Missouri*, 827 F.2d 317, 321 (8th Cir. 1987); *Grigoleit Co. v. United Rubber, Cork, Linoleum and Plastic Workers of America, Local No. 270*, 769 F.2d 434, 437-38 (7th Cir. 1985). In *Grigoleit*, for example, the plaintiff had inexplicably failed to file any response to the defendant's motion for summary judgment over a period of several months. When the district court entered summary judgment in favor of the defendant, the plaintiff objected, arguing that Rule 56(c) required the district court "to notify the opposing

party ten days before ruling on the motion, even if the motion were filed six months earlier." *Grigoleit*, 769 F.2d at 437. The Seventh Circuit rejected that reading of the rule and held that the district court could enter summary judgment at any point without providing ten days' notice to the delinquent party of its intention to do so. *Id.*; *see Fillmore v. Page*, 358 F.3d 496, 510 (7th Cir. 2004). The court in *Grigoleit* distinguished *Capital Films* on the ground that in that case the district court's entry of summary judgment contradicted its earlier assurances to the parties that it would not act on the summary judgment motion and that the case would instead proceed to trial. 769 F.2d at 437. According to the Seventh Circuit in *Grigoleit*, this amounted to improper inducement by the district court in *Capital Films*. *Id.*

Of course, Petitioner's situation is also distinguishable from these "delayed ruling" cases since the district court had, in fact, ruled previously on the defendant's summary judgment motion by denying it a couple of months after it was filed. The district court's initial ruling was perhaps the ultimate form of inducing the parties into believing that the summary judgment issue was settled. Only after the court's initial ruling did a "delay" ensue in the case, and this delay occurred between the November 2003 denial of summary judgment and the April 2004 order granting the same motion for summary judgment. Not counting the court's initial ruling denying summary judgment, the delay between the defendant's filing of its motion for summary judgment and the district court's ordering granting summary judgment was approximately eight months.

To the extent that Petitioner's case may be considered a "delayed ruling" case and not a "*sua sponte* ruling" case, although the First Circuit does not appear to have specifically addressed the propriety of a lengthy delay between a party's moving for summary judgment and the district court's granting of the motion, the case law cited above would seem to indicate that the court would find a violation of Rule 56(c) and Due Process unless the requirements of adequate notice to the targeted party and an opportunity to respond were present. Neither was provided here.

The courts of appeal do not appear to have addressed the situation presented by the unique circumstances of this case. Petitioner's case is neither wholly a case of a *sua sponte* grant of summary judgment nor strictly a case of a delayed ruling granting summary judgment following the motion of a party. The issue of the propriety of the district court's action thus appears to be a matter of first impression. In light of the circuits' divergent approaches to this broad class of cases, guidance from this Court is needed. Because the Court's rationale in *Celotex* concerning the procedural safeguards required to uphold a *sua sponte* grant of summary judgment are even more pronounced in the circumstances presented below, Petitioner respectfully requests that his petition for a writ of certiorari be granted.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit; to remand the matter to the District Court for the District

of Massachusetts for further proceedings; or to provide the Petitioner with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 04-1830

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

EUGENE EMMANUEL,
Plaintiff, Appellant,

v.

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION NO. 25,
Defendant, Appellee.

October 14, 2005, Decided

COUNSEL: Daniel J. Ciccariello with whom Law Office of Daniel J. Ciccariello, was on brief, for appellant.

Matthew E. Dwyer with whom Dwyer, Duddy and Facklam Attorneys at Law, P.C., was on brief, for appellee.

JUDGES: Before Selya, Circuit Judge, Coffin, Senior Circuit Judge, and Howard, Circuit Judge.

OPINIONBY: HOWARD

OPINION: HOWARD, Circuit Judge. After losing his job as a bus driver for Laidlaw, Inc. ("Laidlaw"), Eugene Emmanuel filed a grievance with his union, the International Brotherhood of Teamsters, Local Union

No. 25 ("Union"), claiming that his termination violated the Union's collective bargaining agreement ("CBA"). The Union unsuccessfully pursued Emmanuel's grievance through arbitration. Dissatisfied with the outcome, Emmanuel sued the Union, claiming that it had violated its duty of fair representation during the arbitration. The district court granted summary judgment for the Union. Emmanuel appeals that ruling and also challenges the district court's denial of his motion for reconsideration. We affirm.

I.

In 1999, Emmanuel began work for Laidlaw as a school bus driver in West Roxbury, Massachusetts. On June 14, 2000, Laidlaw asked Emmanuel to drive a bus from its West Roxbury facility to a facility in a neighboring town. Emmanuel claims that, when he entered the bus, he could not find the pre-trip inspection log but recorded his safety observations on the back of his time sheet. He noted that the brake was "set up a little higher than it was supposed to be" but that he did not consider this a safety problem. Emmanuel claims that, as he pulled out of the West Roxbury facility, the bus accelerated out of control and the brakes failed. He steered the bus off the road and crashed through several bushes and a fence before stopping in a ditch.

Emmanuel blamed the accident on defects in the bus's accelerator and brake systems. Laidlaw's investigation revealed that the brakes had been recently serviced and were in working order. After reviewing other relevant materials, including the police report and Emmanuel's statement, Laidlaw determined that Emmanuel was at fault and that the accident was

"serious in nature." The CBA permitted Laidlaw to fire an employee without warning for involvement in a "serious at-fault accident." On August 23, 2000, Laidlaw discharged Emmanuel.

Emmanuel filed a grievance with the Union, claiming that the discharge was "unjust" and requesting reinstatement with backpay. The Union business agent, Ritchie Reardon, represented Emmanuel in the grievance proceedings. In October 2000, Reardon, Emmanuel and several Laidlaw officials met to resolve the grievance. At this meeting, Laidlaw proposed to reinstate Emmanuel and to convert the post-termination period into an unpaid suspension. Emmanuel rejected the offer and demanded arbitration.

Prior to arbitration, Emmanuel met with Reardon to discuss strategy. Emmanuel urged Reardon to argue that the accident was caused by mechanical defects in the bus. Emmanuel provided Reardon with a list of employees who he claimed would support this theory. Reardon told Emmanuel that he should arrange for these employees to contact him because employees generally resist testifying against their employer after being approached by the Union business agent. None of these employees (only one of whom saw the accident) ever contacted Reardon.

Reardon investigated Emmanuel's theory by interviewing several Laidlaw mechanics. These individuals were "hostile" to Emmanuel's claim because Emmanuel had been in other accidents which he had blamed on mechanical defects, and because the

mechanics had taken these excuses "personally." The mechanics told Reardon that the brakes and accelerating system were not defective. Based on these conversations, Reardon believed that, if he were to call "the mechanics to the witness stand they would actually say things that would have harmed Emmanuel's case."

Lacking evidence to corroborate the defect theory, Reardon focused on an alternative argument before the arbitrator. The CBA required Laidlaw to impose discipline on an employee within 20 days of the date that the company learned of the accident.[1] Because Laidlaw did not inform Emmanuel of his discharge until 70 days after the accident, the Union argued that Emmanuel's discharge violated the CBA. The arbitrator rejected this argument and concluded that Emmanuel's discharge was justified under the CBA.

After losing the arbitration, Emmanuel sued the Union for violating the duty of fair representation. His complaint alleged that the Union inadequately investigated his mechanical defect theory and irrationally decided to present the timing issue to the arbitrator. After discovery, the Union moved for summary judgment. The district court concluded, as a matter of law, that the Union had adequately investigated Emmanuel's defect theory and reasonably represented him at the arbitration. Because there was no evidence that the Union's conduct was discriminatory, in bad faith, or arbitrary, the court entered judgment for the Union.

Shortly after this ruling, Emmanuel sought reconsideration based on his discovery of "new evidence." Through an internet search, a paralegal

working on Emmanuel's case found that the bus involved in the accident had been recalled by the manufacturer to check for a defect in the acceleration system. This recall notice was published and available prior to the arbitration. Emmanuel argued that this evidence established a question of fact concerning the sufficiency of the Union's investigation. The district court denied the motion. Emmanuel appeals both the summary judgment and motion for reconsideration rulings.

II.

A. Summary Judgment

We review the grant of summary judgment de novo, taking all disputed facts in the light most favorable to Emmanuel. See *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 184 (1st Cir. 1999). In so doing, we do not consider "conclusory allegations, improbable inferences, and unsupported speculation." *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990). We will affirm the grant of summary judgment so long as the record reflects that no genuine issue of material fact exists and that the Union is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c).

As "the exclusive bargaining representative of the employees, [a] union [has] a statutory duty fairly to represent all of those employees both in its collective bargaining . . . and in its enforcement of the resulting collective bargaining agreement." *United Steelworkers of Am., v. Rawson*, 495 U.S. 362, 372, 109 L. Ed. 2d 362, 110 S. Ct. 1904 (1990) (quoting *Vaca v. Sipes*, 386 U.S.

171, 177, 17 L. Ed. 2d 842, 87 S. Ct. 903 (1967)). This duty is called the "duty of fair representation." *BIW Deceived v. Local S6, Indus. Union of Marine & Shipbuilding Workers of Am.*, 132 F.3d 824, 830 (1st Cir. 1997). A union breaches this duty by acting discriminatorily, in bad faith, or arbitrarily toward a union member. *Morales-Vallellanes v. Potter*, 339 F.3d 9, 16 (1st Cir. 2003). Proof of any of these bad acts will suffice to establish a claim. See id.

Emmanuel argues only that the Union acted arbitrarily in handling his grievance. A union acts arbitrarily "if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." *Miller v. United States Postal Service*, 985 F.2d 9, 11-12 (1st Cir. 1993) (citation omitted). This standard requires the court to examine objectively the competence of the union's representation. See *Neal v. Newspaper Holdings, Inc.*, 349 F.3d 363, 369 (7th Cir. 2003). But in performing this objective evaluation, the reviewing court must accord the union's conduct substantial deference. See *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 78, 113 L. Ed. 2d 51, 111 S. Ct. 1127 (1991); *Morales-Vallellanes*, 339 F.3d at 16. This standard of review recognizes that unions must have ample latitude to perform their representative functions. *Miller*, 985 F.2d at 12.

Emmanuel challenges the Union's investigation of his theory of the accident. In particular, he faults the Union for not interviewing the potential witnesses whom he identified for Reardon.

The duty of fair representation mandates that a union conduct at least a "minimal investigation" into an employee's grievance. *Garcia v. Zenith Elecs. Corp.*, 58 F.3d 1171, 1176 (7th Cir. 1995). But under this standard, only an "egregious disregard for union members' rights constitutes a breach of the union's duty" to investigate. *Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1483 (9th Cir. 1985).

Reardon was willing to speak with the potential witnesses that Emmanuel identified. But he told Emmanuel to urge the witnesses to contact him because, in his experience, employees were reluctant to testify against management after being approached by the Union business agent. As Reardon explained, requiring potential employee-witnesses to come to him tested their "willingness to actually testify or provide evidence that is unfavorable to an employer." Reardon's approach was designed with an eye toward assuring that the Union only called helpful witnesses at the arbitration. This strategy does not constitute a wholesale disregard of the Union's duty to investigate Emmanuel's claim.

Moreover, Emmanuel has not demonstrated, as he must, that any of these employees would have provided beneficial information. See *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 585 (6th Cir. 1994) (stating that the failure to "present favorable evidence during the grievance process . . . may constitute a breach of . . . duty . . . only if that evidence probably would have brought about a different decision"). From our review of the record, none of the witnesses was on the bus at the time of the accident or otherwise was able to offer evidence to corroborate Emmanuel's

assertion that the bus was defective. These witnesses would not have provided competent testimony to support Emmanuel's claim.[2]

In any event, the Union did actively investigate Emmanuel's claim. Reardon spoke to several Laidlaw mechanics about the incident and Emmanuel's theory. These individuals would have been critical witnesses at the arbitration because they could have testified about the mechanical condition of the bus. The mechanics told Reardon that the bus was not defective, and they were openly resentful of Emmanuel's claim. These interviews understandably discouraged Reardon from pursuing the defect theory. Reardon's interviews sufficed to discharge the Union's duty to investigate. See *Garcia*, 58 F.3d at 1177-78 (stating that the union discharged its duty of fair representation by conducting minimally sufficient investigation, even though the grievant would have preferred that the union had investigated his claim more thoroughly); *Castelli*, 752 F.2d at 1483 (holding that the union met its duty of fair representation where the union business representative spent no more that one and a half hours in investigating the grievance and preparing for the arbitration); *Findley v. Jones Motor Freight*, 639 F.2d 953, 956-61 (3d Cir. 1981) (concluding that the union satisfied its duty of fair representation by conducting some investigation of the grievance, even though it could have conducted a more searching investigation).

In addition to challenging the quality of the Union's investigation, Emmanuel faults the Union for presenting the argument that Laidlaw's discharge decision violated the CBA's timing provision. He contends that, because the CBA provision establishing

time limits for imposing discipline was untested, it was irrational for the Union to rely on this argument before the arbitrator. We disagree.

"It is for the union, not the courts to decide whether and in what manner a particular grievance should be pursued." *Patterson v. Int'l Bhd. of Teamsters, Local 959*,121 F.3d 1345, 1349-50 (9th Cir. 1997). A union does not act arbitrarily merely because it errs in interpreting a particular provision of a collective bargaining agreement. *Peterson v. Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985). The CBA provision at issue arguably supported the Union's position that Emmanuel's termination was untimely. As Reardon had not discovered evidence to support the mechanical defect theory, it was rational for him to focus on this alternate theory before the arbitrator. See *Garcia*, 58 F.3d at 1179 (stating that the union satisfied its duty of fair representation where it pursued a rational arbitration strategy even though the employee would have preferred a different strategy).[3]

In sum, the record demonstrates that the Union investigated the mechanical defect theory and presented a rational argument to support the grievance. That is all that the duty of fair representation requires.

B. Motion for Reconsideration

Shortly after the district court granted the Union's motion for summary judgment, Emmanuel sought reconsideration on the ground that he had discovered "new evidence." See Fed. R. Civ. P. 59(e). Specifically, through an internet search, he found that the bus had

been recalled in 1995 because of a problem that resulted in "the accelerator sticking at the full power position." In light of this discovery, Emmanuel argues that the Union was incompetent in not doing this basic research and that, if it had done so, it would have found evidence to support the mechanical defect theory. Emmanuel posits that this recall notice establishes a triable issue on the sufficiency of the Union's investigation, and that the district court abused its discretion in denying his motion for reconsideration.

We review the denial of a motion for reconsideration for a manifest abuse of discretion. See *Vasapolli v. Rostoff*, 39 F.3d 27, 36 (1st Cir. 1994). Rule 59(e) provides litigants with a vehicle to present the district court with evidence uncovered after the entry of judgment. *Aybar v. Crispin-Reyes*, 118 F.3d 10, 16 (1st Cir. 1997). But it "does not provide a vehicle for a party to undo its own procedural failures and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to judgment." Id. (citations omitted). Thus, a district court does not abuse its discretion by denying a motion for reconsideration grounded on the discovery of evidence that, in the exercise of due diligence, could have been presented earlier. See *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 91 n.1 (1st Cir. 1993).

The district court did not abuse its discretion because the recall notice was available to Emmanuel well in advance of the court's summary judgment ruling. Emmanuel admits as much in his appellate brief. In arguing that the existence of the recall notice demonstrated arbitrary conduct by the Union,

Emmanuel stated that the notice was "information that was available to anyone" as it was posted "on the internet." Emmanuel has offered no persuasive reason for waiting until after the entry of judgment to search the internet for publically available documents that could have supported his claim.[4] See *Hayden v. Grayson*, 134 F.3d 449, 455 n.9 (1st Cir. 1998).

III.

For the reasons stated, the judgment is affirmed.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 The CBA provided that "discipline shall be imposed no later than twenty days from the day of the company's knowledge of the incident, which gave rise to such discipline."

n2 Emmanuel suggests that one of the proposed witnesses would have testified that he was aware of a previous circumstance in which a bus accelerator stuck. But without testimony that it was the same bus or bus model that Emmanuel drove on the day of the accident, this testimony, if admitted into evidence at all, would not have been particularly helpful to Emmanuel's case.

n3 Emmanuel also argues that it was irrational for the Union to fail to present evidence that other drivers often recorded pre-trip inspection information, not in the safety log book, but rather in other locations. Such evidence would have made no difference because the arbitrator assumed that Emmanuel conducted an appropriate pre-trip inspection. See *Black*, 15 F.3d at 585.

n4 Emmanuel suggests that he could not have found the recall notice earlier because the discovery order allowed him to take only certain depositions, which would not have led him to discover the notice. Putting aside that Emmanuel could have sought to expand formal discovery, the notice was a public document available on the internet to "anyone." The limits on formal discovery had nothing to do with Emmanuel's delay in searching for this evidence.

Civil Action No. 01-12194-JLT
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EUGENE EMMANUEL,
Plaintif,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 25 AND LAIDLAW TRANSPORTATION, INC.,
Defendants.

MEMORANDUM

May 20, 2004

TRURO, J.

Plaintiff Eugene Emmanuel ("Emmanuel") was terminated from his position as a school bus driver at Laidlaw Transit, Inc. ("Laidlaw")FN1 following a bus accident on June 14, 2000. As a Laidlaw bus driver, Emmanuel was a member of Defendant International Brotherhood of Teamsters, Local 25 ("Union"). Emmanuel filed a grievance with the Union, challenging his termination as unjust and discriminatory. The Union represented Emmanuel throughout the ensuing grievance proceedings, which culminated with an arbitration hearing on February 7, 2001. The arbitration award characterized the termination of Emmanuel's employment from Laidlaw as being for "just cause" and, thus, upheld his termination.fn3

Emmanuel initiated this action against the Union,fn4 alleging that it breached its duty of fair representation at the arbitration hearing.fn5 Specifically, Emmanuel claims that the Union, through its business agent Ritchie E. Reardon ("Reardon"), failed to offer into evidence the testimony of certain witnesses that Emmanuel believes would have been helpful to his case, and that the "[f]ailure to offer this evidence was a breach of the duty of fair representation."fn6

Defendant's motion for summary judgment is now before this court.

Background

Emmanuel was hired by Laidlaw and commenced his employment as a school bus driver at its West Roxbury, Massachusetts facility in June of 1999. On June 14, 2000, Emmanuel agreed to shuttle one of the buses to the Laidlaw facility in Waltham, Massachusetts, in exchange for four hours worth of pay.fn8 Emmanuel alleges that he could not find the pre-trip inspection log book (the "log book")fn9 when he boarded the bus and so, after conducting an interior and exterior check of the bus equipment, he recorded his observations on the back of his time sheet.fn10 The only peculiarity noted by Emmanuel was that the brake pedal was "set up a little high[er] than it[] [was] supposed to [be]."fn11 But, because "all Laidlaw bus brake[s] [are] set up high," Emmanuel did not "feel it[] [was] a safety problem."fn12

Emmanuel and a second driver, Sergo Jean ("Jean"), each were to drive a bus to Waltham.fn13 Emmanuel left the school bus terminal first, with Jean leaving

moments later.fn14 Both drivers were alone in their buses.fn15 According to Emmanuel, just after he pulled out of the terminal, his bus began to "accelerate out of control."fn16 Emmanuel was forced to veer off the road to avoid hitting a car stopped at the intersection before him. In doing so, he plowed over bushes, crossed an adjoining road, went through a chain link fence, and crashed into a ditch on the side of the road.fn17

Emmanuel was transported by ambulance to Faulkner Hospital, where he was treated for neck and back pain and released later that day.fn18 Because June 14, 2000 was the last day of the school year, Emmanuel did not return to work after the accident.fn19 As a result of the accident, the bus sustained damages totaling $5,706.00, and the chainlink fence that the bus drove through, which was private property owned by Pizzeria Uno, sustained $1,850.00 in damages .fn20 Emmanuel denied that he was responsible for the accident, alleging that the accelerator on the bus had become stuck, while the brakes simultaneously jammed and failed.

On June 15, 2000, Laidlaw initiated an investigation into the cause of the accident .fn22 Scott Hansen ("Hansen"), Laidlaw's Fleet Maintenance Director, conducted an inspection of the bus and reviewed its maintenance records .fn23 The records revealed that maintenance work had been done on the bus's brakes several days before the accident and that the work had "been performed by a class A mechanic, who had inspected the entire bus, noted some problems with the brakes, and performed repairs." fn24 Hansen personally checked the brakes and the accelerator, as well as all of the associated parts, and found everything to function properly.

In addition to the results from Hansen's inspection, Laidlaw officials also examined the police report that was made at the scene of the accident, the written statement that Emmanuel provided to Laidlaw on June 23, 2000, photographs from the accident scene, the bus's log book fn26 and the maintenance records for the bus .fn27 Laidlaw determined that Emmanuel was at fault for causing the accident and, further, that "the reports produced, [which] describ[ed] how the accident occurred, as well as the injuries sustained by [Emmanuel] and the damage to the bus and abutting property, show[ed] that this accident was serious in nature."fn28

Pursuant to the collective bargaining agreement between Laidlaw and the Union ("Union Agreement"), which was in effect at all times relevant to this action, "[e]mployees may be disciplined or discharged only for just cause"fn29 and "[n]o warning notice need be given to an employee before he/she is discharged or suspended if the cause of such discharge or suspension is ... [a] [s]erious at-fault accident."fn30 Based on its finding that Emmanuel had caused a "serious at-fault accident," Laidlaw terminated Emmanuel on August 23, 2000.fn31

An initial grievance meeting was held on that same day, at which several Laidlaw officials, Reardon, and Emmanuel were all present. fn32 At this meeting, Emmanuel filed a grievance report with the Union, which stated the nature of his grievance as "unjust termination and discrimination," with the desired settlement being that Laidlaw allow Emmanuel to "return to work with all wages and benefits lost" compensated to him. fn33

The Union's policy governing the grievance process, at all times relevant to this action, was as follows: A Union steward initially handled the grievances that were filed by members of the Union .fn34 If the steward could not resolve the grievance with a Laidlaw official, then a Union business agent or field representative would get involved and attempt to resolve the grievance through a settlement.fn35 If issues remained unresolved after this second step, then the business agent or field representative would handle the procession of the grievance through arbitration.fn36 At the time of the accident, Benoit H. Eerie ("Eerie") was an "unofficial[] ... union representative" or "substitute steward" for the Union, and he "played the role of steward" throughout Emmanuel's grievance proceedings. fn37 Reardon was the business agent who handled grievance through arbitration.

Reardon scheduled a grievance hearing with Laidlaw officials on October 27, 2000. Emmanuel, Eerie, Reardon, and several Laidlaw officials attended the hearing. fn38 Laidlaw proposed a settlement at this hearing, which was later memorialized in a written grievance settlement proposal, that would have reinstated Emmanuel to his former position and converted his discharge into an unpaid suspension. The settlement contained several conditions, including a requirement that Emmanuel attend at least four hours of post-accident retraining and precluded Emmanuel for being eligible for backpay. fn39 Despite Reardon's recommendation that he accept the reinstatement with the conditions, the proposal was not satisfactory to Emmanuel.fn40 On November 2, 2000, Emmanuel's attorney faxed Reardon a handwritten statement, signed by Emmanuel, which instructed Reardon "to

decline the offer and to go to arbitration."fn41

Prior to the arbitration hearing, Emmanuel and Eerie met with Reardon to discuss legal strategies.fn42 It was Emmanuel's desire to proceed on a no-fault argument because he maintained that the accident was the result of a mechanical defect (hereinafter referred to as the "mechanical defect theory"), specifically "a sticky accelerator and a bad brake."fn43 Emmanuel also had a list of people that he wanted to have testify at the arbitration hearing to support his theory.fn44 The Union had a different legal theory upon which it wanted to proceed.fn45 But, nonetheless, Reardon told Emmanuel that "if he had some people that he wanted to have [Reardon] talk to[, then Emmanuel should] have them call [Reardon]" because "it's tough to reach out to employees when they are going to be going against their employer."fn46

The Union believed the more viable legal theory to pursue at arbitration was "procedural in nature."fn47 Specifically, the theory was that Laidlaw had violated Article XI, Section 2 of the Union Agreement, which states that "discipline shall be imposed no later than twenty (20) days from the day of the company's Knowledge of the incident, which gave rise to such discipline" (hereinafter referred to as the "contract theory"). Laidlaw had not taken any disciplinary action against Emmanuel until August 23, 2000, seventy (70) calender days after the date of the accident.fn48

The pursuit of the mechanical defect theory required eye-witnesses to corroborate Emmanuel's story of the brake and accelerator problems.fn49 None of the witnesses that Emmanuel wanted to have testify at the

arbitration hearing were on the bus at the time of the accident, nor were all of them even at the scene of the accident.fn50 What is more, none of the other bus drivers ever contacted Reardon to offer to testify on Emmanuel's behalf.fn51

The Union initially thought that it would be beneficial to have some mechanics testify as to the probability that mechanical defects were to blame for the accident. fn52 But, during his own pre-arbitration investigation, Reardon spoke to several Laidlaw mechanics who had worked on the bus after the accident and found them to be "hostile."fn53 Specifically, after speaking to Laidlaw mechanic Billy Berg, it was Reardon's understanding that "if [he] were to have called mechanics to the witness stand, they would actually say things that would have harmed Mr. Emmanuel's case."fn54 Given the lack of witnesses who could offer probative evidence in support of the mechanical defect theory, the Union decided to rely on the contract theory and informed Emmanuel of its intention to do so.fn55

The arbitration hearing was held before Beth Anne Wolfson ("the Arbitrator"), on February 7, 2001.fn56 The Arbitrator ultimately decided that Laidlaw terminated Emmanuel's employment for "just cause," that Laidlaw "ha[d] the power to determine what [wa]s a serious at-fault accident without Union input," and that Laidlaw had conducted its investigation and made its determination in a timely manner, and, thus, did not violate the Union Agreement by waiting until August 23, 2000 to notify Emmanuel of its decision to terminate his employment. fn57 The Arbitrator found Hansen's testimony that the accelerator and brakes on the bus were operating properly at the time of the accident to

be "credible," and she found Emmanuel's testimony regarding the cause of the accident to be "not credible."fn58 On May 19, 2001, the Arbitrator issued the Arbitration Award in favor of Laidlaw and mailed a copy to the Union, which in turn mailed a copy of the last page to Emmanuel on May 24, 2001,fn59

Discussion

Defendant has filed a motion for summary judgment. Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where there exists "no genuine issue as to any material fact and [where] the moving party is entitled to judgment as a matter of law."fn60 The First Circuit has described a "genuine" issue as one that "may reasonably be resolved in favor of either party," which requires the finder of fact to make a choice between two reasonable outcomes of a factual dispute.fn61 In order to convince a court that a genuine issue of a material fact exists, the nonmoving party must produce "hard evidence of a material factual dispute," which is not "conjectural or problematic, but must have substance."fn62

It is the responsibility of the moving party to "make a preliminary showing that no genuine issue of material fact exists," after which the nonmoving party must "point[] to specific facts demonstrating that there is, indeed, a trialworthy issue."fn63 while the court must "view all facts in the light most favorable to the nonmoving party[,] ... [it] need not credit conclusory allegations, improbable inferences, and unsupported speculation."fn64 The First Circuit has made it clear that "[n]either wishful thinking ... nor conclusory responses unsupported by evidence ... will serve to

defeat a properly focused Rule 56 motion. fn65

Emmanuel claims that, throughout the grievance process, the Union breached the duty of fair representation that it owed him. He bases his allegations on three main points: (1) "the Union offered no testimony at the Arbitration Hearing that there was any mechanical malfunction of the bus," even though Emmanuel had informed Reardon of "witnesses who could testify," (2) the Union "offered no testimony to show that bus operators routinely fill out a one-page document in lieu of a logbook," which could have bolstered Emmanuel's credibility in the eyes of the Arbitrator, and (3) the Union did not have an alternate legal theory to argue, in the event that the contract theory was not well received by the Arbitrator.fn66

In response to Emmanuel's allegations, the Union argues that it did not breach its duty of fair representation.fn67 The Union further contends that even if it had breached its duty of fair representation, Emmanuel's claims are barred by the six month statute of limitations prescribed by the common law.fn68

A. Breach of the Duty of Fair Representation

The First Circuit has found a breach of the duty of fair representation only when a union's conduct is discriminatory, done in bad faith, or is arbitrary.fn69 Courts must respect the "well-recognized need to allow unions ample latitude in the performance of their representative duties," and thus, "[c]ourts may not substitute their own views [on how a grievance proceeding should have been handled] for those of the union."fn70 It follows that "any substantial examination

of a union's performance ... must be highly deferential." fn71

Emmanuel has offered no evidence that the Union acted either in a discriminatory manner, in bad faith, or arbitrarily in its handling of his grievance process, up to and including the arbitration hearing. Accordingly, no issues of triable fact have been identified that would preclude summary judgment in favor of the Union.

1. Discriminatory Conduct

Emmanuel has produced no evidence that the Union handled his grievance process in a discriminatory manner. In fact, the only place in the record where such an allegation can arguably be found is as an inference in Emmanuel's complaint. The complaint simply states that "[t]he bus drivers are 95% Afro-American or Haitian Americans. The mechanics, which the [] Union also represents, are mostly white. If the accident were not [Emmanuel's] (who is Haitian American) fault then it would be the fault of the mechanics."fn72 These statistics are not elaborated upon elsewhere in the complaint, there is no count specifically alleging discrimination based on race or any other impermissible factor, and none of the deposed bus drivers, including Emmanuel, make any reference to ever being discriminated against by Union officials. Emmanuel has, thus, failed to show that the Union acted in a discriminatory manner.

2. Conduct Made in Bad Faith

Emmanuel similarly has failed to produce any "hard evidence" that the Union acted in bad faith at any time

during the grievance process.fn73 In the context of breach of the duty of fair representation, courts have defined bad faith in several ways. Some courts, including the First Circuit, have simply relied on the definition provided by various editions of Black's Law Dictionary. One such version defines bad faith as "generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or contractual obligation, not prompted by any honest mistake as to one's rights or duties, but by some interested or sinister motive." fn74 The Second Circuit has found bad faith where the facts show "fraudulent, deceitful, or dishonest action."fn75 Other courts require a showing of a "bad faith motive" in order to establish "bad faith conduct," for purposes of establishing breach of the duty of fair representation.fn76

The common thread that runs through each of the above definitions of bad faith is that there must be some factual showing of the alleged perpetrator's conscious intention to commit a deceptive or dishonest act. The record before this court contains nothing to suggest any motive of the Union to maliciously or intentionally wrong Emmanuel. To the contrary, the facts, even as viewed in the light most favorable to Emmanuel, show that Reardon took the time to conduct his own investigation into the accident by meeting with the mechanics who had worked on the bus, that he met with Emmanuel several times during the grievance process, and finally that he accompanied Emmanuel as an advocate both to the initial grievance hearing on October 27, 2000 and to the arbitration hearing on February 7, 2001.fn77

Not only were no facts produced to support a contention that Reardon harbored animosity or any other feelings of ill-will toward Emmanuel, but Emmanuel has not even alleged any specific motive that any Union representative might have had. Without an allegation of a bad faith motive, and without any facts from the record that could support such an allegation, this court cannot find that the Union acted in bad faith.

3. Arbitrary Conduct

The final factor to address is whether the Union acted in an arbitrary manner during Emmanuel's grievance process. The First Circuit has held that "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational."fn78 Although the First Circuit has not been confronted with many disputes involving a challenge to the legal tactics employed by a grievant's representative union at an arbitration hearing, other circuits have addressed this very situation. The Second Circuit has held that "[t]actical errors are insufficient to show a breach of the duty of fair representation ... [a]s long as the union act[ed] in good faith."fn79 The Ninth Circuit has further held that there must be an act that required the exercise of judgment before breach will be found, and even then a breach occurs only if the union's conduct lacks a rational basis.fn80 This "rational" or "reasonable" conduct standard is echoed by the Sixth Circuit, which has declared that "a union does not acquire liability for its decisions and judgments as long as the decision has a reasonable basis."fn81

The reasoning of the abovementioned courts fits well within the First Circuit's widely- accepted rule that courts be "highly deferential" to a union's performance throughout grievance proceedings.fn82 To meet the high threshold of showing arbitrariness on the part of the Union, Emmanuel must show more than that it acted in a "mere[ly] negligen[t]" manner or used "erroneous judgment" during the grievance process.fn83 It is Emmanuel's burden to show that the conduct of the Union was "so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary."fn84 Emmanuel posits that "a fact finder could find that the record shows that the Union's conduct by not presenting witnesses or other testimony to the [A]rbitrator was so egregious that [it] would be far short of the minimum standards of fairness."fn85 This court disagrees.

Emmanuel's complaint is based on two broad allegations of arbitrary conduct: (1) the failure of the Union to call witnesses to testify at Emmanuel's arbitration hearing, both to support the mechanical defect theory and the use of time sheets in lieu of log books for pre-trip inspections, and (2) the Union's decision to pursue the contract, rather than the mechanical defect, theory at arbitration. These two allegations are inextricably linked, but since the latter seems to encompasses the former it will be addressed first.

Reardon testified, at his deposition, that in order to pursue the mechanical defect theory, he needed witnesses who could corroborate Emmanuel's story that the accelerator pedal on the bus stuck. fn86

Unfortunately, none of the witnesses that Emmanuel wanted to testify were on the bus, nor were they all even witnesses to the accident. fn87 Emmanuel argues that some of the testimony would have shown that sticky accelerator pedals were not uncommon on the buses. He states that "Reardon was informed [by Smith] that this same [type of] incident occurred to another bus driver."fn88 But, Smith's actual testimony is that he "[did] not remember" telling Reardon that story. fn89

Reardon also testified that the mechanics who Emmanuel wanted to testify were "hostile," and that they wanted to testify at the arbitration hearing, but only to "say things that would have harmed [] Emmanuel's case."fn90 The mechanics "wanted to testify against [Emmanuel] because he had had two accidents and claimed bus failure both times so [the mechanics] took it a little personal [ly]. "fn91 It was reasonable for the Union to decide not to have these mechanics testify at Emmanuel's arbitration hearing.

Reardon's testimony regarding his standard practice when using Union members as witnesses further convinces this court that the Union's decision was rational. Reardon testified that he does not like to reach out to members of the Union to ask them to testify against their employer, rather he typically requires the grievant to inform potential witnesses to contact Reardon.fn92 The rationale is that he likes to "test the willingness of people to actually testify or provide evidence that is unfavorable to an employer."fn93 These tactics are far from irrational or unreasonable.

Contrary to Emmanuel's argument that the Union's

decision to argue "an untried interpretation of a contractual clause," rather than to pursue the mechanical defect theory, was "arbitrary [in] nature," this court finds the Union's conduct to be sufficiently reasonable to withstand liability for breach of the duty of fair representation.fn94 Given the undisputed fact that there were no witnesses on the bus, in conjunction with the fact that there were no mechanics willing to support Emmanuel's mechanical defect theory, there were, quite simply, no witnesses who seemed likely to effectively corroborate the mechanic defect theory. Emmanuel has failed to meet his burden of showing that the Union acted so egregiously or irrationally as to be arbitrary.

It is not for this court to substitute its own views and conclude that, as Emmanuel avers, it would have been a better strategy for the Union to have been prepared to present an alternative legal theory at the arbitration hearing, rather than to rely solely on the contract theory. As previously noted, "erroneous judgment [does] not constitute a breach of the duty of fair representation."fn95

Emmanuel has failed to create a material factual dispute such that this court could find that the Union's behavior in presenting a single legal theory was "so far outside a wide range of reasonableness as to be irrational."fn96 But, because Emmanuel's other theory of arbitrariness addresses the Union's failure to call witnesses for purposes beyond proving the mechanical defect theory, a brief discussion of some of the arguments raised by Emmanuel in support of this other theory is warranted.

Simply stated, the fact that Reardon pursued the contract theory rendered the need for Emmanuel's desired witnesses moot. Emmanuel makes much of the argument that the testimony of the bus drivers could have provided the Arbitrator with evidence regarding the appropriate protocol for when bus drivers cannot find the pre-trip inspection log book on the bus. Emmanuel speculates that such testimony "could [have] bolster[ed] [his] testimony not only in the eyes of the Arbitrator, but also would show that the pre-trip inspection was completed."fn97 But, upon review of the Arbitration Award, it is immediately apparent that the Arbitrator was more concerned with whether or not Emmanuel had performed the pre-trip inspection at all, rather than whether he recorded it on the proper form.fn98 The Arbitrator found Emmanuel not to be credible based on his own contradictions, not for a lack of testimony on the use of time sheets in lieu of log books for pre-trip inspections.

The Arbitrator focused on the fact that Emmanuel's handwritten statement, made several days after the accident, stated that he found the log book on the bus, but that Emmanuel later claimed that he had not found it on the bus.fn99 The Arbitrator was also influenced by the fact that Emmanuel did not produce the time sheet on which his pre-trip inspection had allegedly been recorded until the initial grievance meeting on August 23, 2003, at which time it remained unclear whether he had produced the original or just a copy. fn100 What is more, Reardon asked Emmanuel to bring the original time sheet on which he wrote the pre-trip inspection report to the arbitration hearing, but Emmanuel "forgot" it.fn101

Emmanuel's assertion that the testimony of bus drivers would have helped him at arbitration is based on nothing more than conjecture. Ultimately, whether the grievance process could or should have ended on a more favorable note for Emmanuel is not an issue before this court. The sole issue is whether the Union breached the duty of fair representation that it owed to Emmanuel.

Emmanuel's arguments are laden with unsupported speculation, and he has failed to meet the difficult burden of producing sufficient evidence to show that the Union acted in a discriminatory or arbitrary manner, or that it acted in bad faith. Because Emmanuel has failed to offer evidence that the "handling of the grievance procedure itself was materially deficient,"' fn102 this court must find in favor of the Union on its motion for summary judgment.

B. Statute of Limitations

Because summary judgment is appropriate on the grounds that the Union did not breach its duty of fair representation, this court will not reach the issue of whether the present action is barred by any statute of limitations.

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is ALLOWED.

/s/ Joseph L. Tauro United States District Judge

Footnotes

fn1while there is some confusion amongst the parties' documents as to whether the correct name is Laidlaw Transportation, Inc., or Laidlaw Transit, Inc., for purposes of this memorandum this court uses simply "Laidlaw."

fn2 Def.'s Statement of Undisputed Facts Par. 6.

fn3 Id.; Arbitration Award, submitted in supp. of Def.'s Mot. for Summ. J., Ex. 14 ("Arbitration Award") at 9.

fn4 On March 17, 2004, this court allowed former Def. Laidlaw Transit, Inc.'s Mot. for J. on the Pleadings or, in the alternative, for Summ. J., which was unopposed.

fn5 See Compl. Pars. 30-57.

6 Id.

fn7Def.'s Statement of Undisputed Facts Par. 1.

fn8 Id. Par. 3; Dep. of Eugene Emmanuel, submitted in supp. of Def.'s Mot. for Summ. J., Ex. 2 ("Emmanuel Dep.") at 64-65.

fn9 Before embarking on any trip, all Laidlaw bus drivers are required to fill out the log book, which is usually kept inside of the bus. The log book records the observations of the driver after he conducts a visual inspection of the interior and exterior of the bus. Def.'s Statement of Undisputed Facts Par. 2.

fn10Emmanuel Dep. at 67-68. It should be noted that there is some conflicting evidence regarding the presence of the log book on the bus. While Emmanuel testified in his deposition that he did not find the log

book on the bus, in a statement that Emmanuel handwrote and submitted to Laidlaw on June 23, 2000 he stated that "[w]hen I got in the bus, I found the key and then the log for the pretrip." Id. at 111-113; Handwritten Report by Emmanuel, submitted in supp. of Def.'s Mot. for Summ. J., Ex. 13 ("Handwritten Report") at 10-13 . This contradiction is relevant insofar as it was found to be significant by the Arbitrator. See Arbitration Award at 10-11.

fn11 Emmanuel Dep. at 70.

fn12 Id. at 73.

fn13 Id. at 64-65.

fn14 Id. at 74; Dep. of Sergo Jean, submitted in supp. of Def.'s Mot. for Summ. J., Ex. 4 ("Jean Dep.") at 18-21.

fn15 Dep. of Ritchie E. Reardon, submitted in supp. of Def.'s Mot. for Summ. J., Ex. 3 ("Reardon Dep.") at 82.

fn16 Emmanuel Dep. at 85.

fn17 Id. at 85-92; Def.'s Statement of Undisputed Facts Par. 4. The events described in this paragraph are hereinafter referred to as "the accident."

fn18Emmanuel Dep. at 104.

fn19 Id. at 203.

fn20 Arbitration Award at 7.

fn21 Emmanuel Dep. at 85,155; Def.'s Statement of Undisputed Facts Par. 4.

fn22 Def.s Statement of Undisputed Facts Par. 5; Arbitration Award at 5.

fn23 Id.

fn24 Id.

fn25 Id.

fn26 The log book was found by Laidlaw officials on the bus immediately after the accident. Arbitration Award at 7.

fn27 Def.'s Statement of Undisputed Facts Par 5.

fn28 Arbitration Award at 10.

fn29 Union Agreement Between Teamsters Local #25 and Newton Massachusetts Terminal, Laidlaw Transit, Inc. (1999-2002), submitted in supp. of Def 's Mot. for Summ. J., Ex. 1 ("Union Agreement') at art. XI, § I (emphasis added).

fn30 Id. at art. XI, § 2(7) (emphasis added); Compl. Par. 11.

fn31 Letter from Linda Mendes to Emmanuel, submitted in supp. of Def.'s Mot. for Summ. J., Ex. 13; Compl. Par. 10.

fn32 Emmanuel Dep. at 142-143; Reardon Dep. at 40.

fn33 Teamsters Local 25 Grievance Report,, submitted in supp. of Def.'s Mot. for Summ. J., Ex. 9 ("Def.'s Initial Disclosure #2").

fn34 Reardon Dep. at 19-20.

fn35 Id.

fn36 Id.

fn37 Dep. of Benoit H. Eerie, submitted in supp. of Def.'s Mot. for Summ. J., Ex. 7 ("Eerie Dep.") at 50-52. The official steward, Roland Smith ("Smith"), was on vacation immediately following the accident, but it seems that his involvement in Emmanuel's case was further limited because Emmanuel "dislikes" Smith. Dep. of Roland Smith, submitted in supp. of Def.'s Mot. for Summ. J., Ex. 6 ("Smith Dep.") at 36-37.

fn38 Emmanuel Dep. at 146.

fn39 Grievance Settlement Proposal, submitted in supp. of Def.'s Mot. for Summ. J., Ex. 10 ("Def.'s Initial Disclosures #4").

fn40 Reardon Dep. at 66; Emmanuel Dep. at 155.

fn41 Facsimile from Daniel J. Ciccariello to Reardon, submitted in supp. of Def.'s Mot. for Summ. J., EX. 11(Def.'s Initial Disclosures #5").

fn42 Emmanuel Dep. at 162-165; Reardon Dep. at 70.

fn43 Reardon Dep. at 74.

fn44 Emmanuel Dep. at 192-194.

fn45 See infra, notes 45-47 and accompanying text.

fn46 Reardon Dep. at 71. Reardon further testified that requiring potential employee witnesses to call him was "a tact[ic] that [he] frequently [uses] to test the willingness of people to actually testify or provide evidence that is unfavorable to an employer." Id. at 71-72.

fn47 Def.'s Statement of Undisputed Facts Par. 8.

fn48 Emmanuel Dep. at 162-163.

fn49 Reardon Dep. at 82.

fn50 Significantly, Eerie, who accompanied Emmanuel to all of the meetings and hearings leading up to and including the arbitration hearing, first learned of the accident when he heard about it on a television news program. Eerie Dep. at 26. Eerie later called Reardon to inform him that he "d[id not] think that Emmanuel [wa]s crazy [enough] to speed [in] a bus like th[at] on ... Rivermoor Street." Id. at 29.

fn51Reardon Dep. at 73.

fn52 Id. at 78.

fn53 Id. at 82. Apparently Emmanuel had two accidents while working at Laidlaw, and he blamed each accident on mechanical failure, which offended the mechanics who took Emmanuel's excuses "personal [ly]." Id. at 78.

fn54 Id.

fn55 Id. at 84.

fn56 Arbitration Award at 1; Def.'s Statement of Undisputed Facts Par. 15.

fn57 Arbitration Award at 9,12-13.

fn58 Id. at 10.

fn59 Def.'s Statement of Undisputed Facts Par. 16.

fn60 Fed. R. Civ. P. 56(c).

fn61 Griggs Ryan v. Smith, 904 F.2d 112,115 (1 st Cir.1990) (internal quotations omitted). A "material" fact was simply defined as one that "affects the outcome of the litigation" and, as such, must "be resolved before the related legal issues can be decided." Id.

fn62 Id. (alteration omitted).

fn63Blackie v. Maine, 75 F.3d 716, 721(1 st Cir.1996) (internal quotations omitted).

fn64Bloomfield v. Bernardi Automall Trust, 170 F. Supp. 2d 36, 40 (D. Mass. 2001) (internal quotations omitted).

fn65Griggs-Ryan 904 F.2d at 115 (internal citations omitted).

fn66Compl. Pars. 29, 32; Mem. of Law of Pl., Eugene Emmanuel, in Supp. of Pl.'s Mot. in Opp'n to Def.'s, Int'l Bhd. of Teamsters, Local 25, Mot. for Summ. J., ("Pl.'s Mem.") at 13,15.

fn67 Mem. of Law in Supp. of Def., Int'l Bhd. of Teamsters, Local 25's Mot. for Summ. J. ("Def.'s Mem.")

at 5.

fn68 Id.

fn69 Miller v. U. S. Postal Serv., 985 F. 2d 9,11 (1st Cir.1993) (quoting Vaca v. Sipes, 386 U. S. 171,190 (1967) ("A Union breaches this duty `only when [its] conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith"') (alteration in original).

fn70 Id. at 12.

fn71 Id.

fn72 Compl. Par. 26.

fn73 See Griggs-Ryan v. Smith, 904 F.2d 112,115 (1 st Cir.1990).

fn74 Local No. 48, United Bhd. of Carpenters and Joiners of Am. v. United Bhd. of Carpenters and Joiners of Am., 920 F.2d 1047, 1054 (1 st Cir.1990).

fn75 Sim v. N.Y. Mailers' Union No. 6,166 F.3d 465, 472 (2d Cir.1999).

fn76 Medlin v. Boeing Vertol, Co., 620 F.2d 957, 961 (3d Cir.1980) (internal citations omitted).

fn77 See supra notes 31-41, 55 and accompanying text.

fn78 Miller v. U. S. Postal Serv., 985 F .2d 9,12 (1 st Cir.1993) (quoting Air Line Pilots Ass'n Int'l v. O'Neill, 499 U.S. 65, 67 (1991)).

fn79 Barr v. UPS, Inc., et al, 868 F.2d 36, 43-44 (2nd Cir.1989).

fn80Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir.1985).

fn81 Poole v. Budd Co., 706 F.2d 181,184 (6th Cir.1983).

fn82 Newbanks v. Cent. Gulf Lines, Inc., 64 F. Supp. 2d 1, 5 (D. Mass. 1999) (internal citations omitted).

fn83 Miller, 985 F.2d at 12.

fn84 Barr, 868 F.2d at 43.

fn85 Pl.'s Mem. at 12.

fn86 Reardon Dep. at 82.

fn87 Id. at 74; Def.'s Statement of Undisputed Facts Pars. 9-11. Eerie learned of the accident from a television news program, Eerie Dep. at 26, Jean was in another bus and observed the aftermath of the accident, but not the accident itself, Jean Dep. at 19-20, and another bus driver, Tony Pierre, watched the accident from the inside of the Laidlaw school bus yard and was the only actual witness to the event, Dep. of Tony Pierre, submitted in supp. of Def.'s Mot. for Summ. J., Ex. 5 ("Pierre Dep.") at 15-20. Two other bus drivers named by Emmanuel at his deposition were not deposed and there is no testimony pertaining to their knowledge of the accident. Emmanuel Dep. at 193-194.

fn88 Pl.'s Mem. at 14 (citing Smith Dep. at 38-39).

fn89 Smith Dep. at 38. Emmanuel cannot create a genuine factual dispute by misrepresenting the record. What is more, this fact is not a material one, since the contract theory was a reasonable one to present, therefore, any dispute relating to Smith's testimony and what he does not remember telling Reardon does not preclude summary judgment.

fn90Reardon Dep. at 78, 82.

fn91 Id. at 78.

fn92 Id. at 71.

fn93 Id. at 71-72.

fn94 The Ninth Circuit has held that a union's conduct is not "deemed arbitrary simply because of an error ... in interpreting particular provisions of a collective bargaining agreement." Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir.1985).

fn95 Miller v. U. S. Postal Serv., 985 F.2d 9,12 (1 st Cir.1993). This court does not contend one way or the other that the Union's judgment was erroneous, only that it was reasonable.

fn96 See id. at 12.

fn97 Pl.'s Mem. at 15.

fn98 See Arbitration Award at 10.

fn99 Id. at 10-11.

fn100 Id. at 7.

fn101 Reardon Dep. at 80.

fn102 Newbanks v. Cent. Gulf Lines, Inc., 64 F. Supp. 2d l, 5 (D. Mass. 1999) (internal citations omitted).

Civil Action No. 01-12194-JLT
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EUGENE EMMANUEL,
Plaintif,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 25 AND LAIDLAW TRANSPORTATION, INC.,
Defendants.

ORDER
April 15, 2004

TAURO, J.

This court has reconsidered its November 17, 2003 denial of Defendant, International Brotherhood of Teamsters, Local 25's Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1 [#29]. This court now concludes that Defendant's conduct was not arbitrary, discriminatory, or exercised in bad faith. Defendant, International Brotherhood of Teamsters; Local 25's Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1 [#29] is, therefore, ALLOWED. An opinion will issue.

IT IS SO ORDERED.

/S/ Joseph L. Tauro United States District Judge

No. 04-1830

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

EUGENE EMMANUEL,
Plaintiff, Appellant,

v.

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION NO. 25,
Defendant, Appellee.

ORDER OF COURT

Entered: November 4, 2005 Appellant's Petition for Rehearing is denied

By the Court:
Richard Cushing Donovan, Clerk.

CIVIL ACTION NO. 01-12194JLT

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MASSACHUSETTS

EUGENE EMMANUEL
PLAINTIF,

V.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 25 AND LAIDLAW TRANSPORTATION, INC.
DEFENDANTS

MEMORANDUM OF LAW OF PLAINTIFF, EUGENE EMMANUEL, IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION AND RELIEF FROM ORDER

Plaintiff Eugene Emmanuel (hereinafter "Plaintiff"), respectfully submits this Memorandum of Law in support of his Motion for Reconsideration and Relief from Order.

Procedurally, on August 2, 2003, the Defendant, International Brotherhood of Teamsters, Local 25 (hereinafter "Union"), filed a Motion for Summary Judgment. This Honorable Court denied the Motion without prejudice on November 17, 2003. After a pretrial conference on April 14, 2004, this Court reconsidered the Motion sua sponte, and issued a final Order granting the Motion on April 15, 2004. This Motion for reconsideration is timely filed.

Plaintiff now respectfully Moves this Court to reconsider its Order of Summary Judgment for Defendants and grant Plaintiff relief in the interests of justice. Plaintiff respectfully asserts that a seven. month period between Defendant's Motion and the subsequent grant of a final order should be accompanied with an opportunity to update the record with evidence obtained during that time frame, and now asks the court to accept this evidence and reconsider the final order.

When the evidence herein is considered by the Court, Plaintiff believes that genuine issues of material facts are raised that should be placed before a trier of fact, and that Summary Judgment as a matter of law is inappropriate.

SUMMARY OF ARGUMENT.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R. Civ.P. 56(c) (2003). The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Reich v. John Alden Life Ins. Co., 126 F. 3d 1, 6 (1st Cir 1997)(italics added). When faced with a motion to reconsider, the district court must apply an interests of justice test. See United States v. Roberts, 978 F 2d 17, 21 (1st Cir. 1992); Greene v. Union Mut.

Life Ins Co., 764 F. 2d 19, 23 (1st Cir.1985).

Plaintiff respectfully asserts that the interests of justice mandates reconsideration of the final Order, given that more a seven-month period has elapsed between the filing of the Motion for Summary Judgment and the subsequent granting that Motion.

Plaintiff has not during this period, rested in discovery, but rather, has gleaned additional evidence that when taken in Plaintiff's favor, raises genuine issues of material fact. Thus, Plaintiff requests that this Court reconsider its Order in light of this evidence, and grant relief to Plaintiff by denying the Motion for Summary Judgment, and proceeding to a trial before a fact finder.

A. Defendant Breached The Duty of Fair Representation In Falling to Investigate, Disclose, and Argue In Arbitration Known Defects In The Acceleration System Of The Bus Driven By The Plaintiff That Were Known To Cause Accidents Consistent With The One That Occurred, And That The Breach Was Arbitrary, Capricious Or Exercised In Bad Faith.

The Defendant here has failed perform any meaningful investigation, even when it knew or should have known that an uncorrected defect in the bus could have caused the accident consistent with what the Plaintiff stated on numerous occasions. Such a "perfunctory," "sadly lacking," and "arbitrary"' representation is a violation of the duty. Holodnak v. Avco Corp., 14 F.2d 285, cert. denied 423 US 892 (1975). Thus a perfunctory handling of a grievance where there is substantial reason to believe that it contributed to an erroneous outcome has

been held to be a breach of the duty of fair representation. Hardee v. North Carolina Allstate Serv., 537 F. 2d 1255 (4h Cir. 1976).

Plaintiff has discovered. that the bus driven during the accident had a record of a faulty acceleration. system, and that faulty system could result in an accident consistent with the on that occurred while the Plaintiff was operation the bus. Defendant Laidlaw received a recall notice from the Manufacturer concerning the faulty system and a description of potential accidents that could result. However, the manufacturer's records indicate that the particular bus driven by the Plaintiff during the accident had not been presented to the manufacturer for the required repay.

The failure by the Defendant to investigate, disclose or argue in arbitration is a perfunctory sadly lacking representation of the Plaintiff, and can be held to be a substantial reason for an erroneous outcome of the arbitration.

This, Plaintiff respectfully requests this Court to consider this evidence, and to reconsider it Order for Summary Judgment.

B. The Alternative Theory of the Defendant's at the Arbitration Hearing.

The Defendant leaned heavily in its Motion for Summary Judgment on the fact that it presented an alternative theory to the Arbitration hearing on why the Plaintiff should not be terminated from his position. A simple reading of the Arbitration decision shows that the Defendant's alternative theory was summarily

dismissed in Arbitration as frivolous. The Defendant presented no authority, whether in case law or customary practice, to the Arbitrator for this position; did not refute the position that the "decision" to fire was within the twenty days, did not refute the factual evidence of the Employer tried to contact the Union to discuss this matter but the Union avoid this contact; and that the Union was not hampered by this passage of time to conduct an investigation.

The Defendant in its Motion for Summary Judgment states "Mr. Reardon's discretion to make tactical choices was not exercised in bad faith or discriminatory manner." The question whether the decision to rely solely on an untried position. with no evidentiary backup or authority was arbitrary or in bad faith, based on the foregoing is a question of fact for a fact finder.

Even so, the above position has more support - the Arbitrator's final paragraph in the decision

"And, at that meeting [August 23, 2000], Grievant [Plaintiff] had the opportunity to present to the Employer [Laidlaw] whatever evidence he had to refute its conclusion that the accident was his fault. The fact that Grievant could not convince the Employer to change its mind at that time does not prove that he was prejudiced."

This passage summarizes the entire case. The Defendant had the opportunity to present evidence to show that the accident was not the Plaintiffs fault. Failure to do so was arbitrary, discriminatory or exercised in bad faith.

Not only was this information available to the Union Business Agent at that time but his failure to obtain this information, from whatever sources but particularly from the mechanics or from Laidlaw, his failure to investigate bus recalls when there was a life-threatening accident, and his failure to use such information at an Arbitration hearing demonstrates that at the very least there are triable facts as to whether the Union breached its duty of fair representation in conduct that was arbitrary, discriminatory or exercised in bad faith.

III. ARGUMENT.

The Motion for Summary Judgment filed, on August 2, 2004, by the Defendant, International Brotherhood of Teamsters, Local 25. was based on two theories: the Plaintiffs Claire was timed barred and that the Union's decision not to call witnesses at the Arbitration. Hearing does not create triable Issues of Fact. The Defendant asserted that it was entitled to summary judgment because based on these two theories there was no genuine issue as to any material fact and that the moving party (the Defendant) is entitled to judgment as a matter of law.

The Court in its Order of April 15, 2004, stated. that it "now concludes that the Defendant's conduct was not arbitrary discriminatory or exercised in bad faith," Therefore, this Memorandum will only deal with the latter argument by the Defendant and its overall conclusion that the Defendant was entitled to summary judgment.

Failure To Investigate, Disclosure Or Argue At

Arbitration Evidence Of A Faulty Acceleration System.

Evidence of the Defendant's breach of its duty of fair representation is its failure to even attempt to obtain critical but simple and straightforward documentation of a recall involving the acceleration system of the bus driven by the Plaintiff: Evidence shows that the manufacturer of the bus notified Defendant Laidlaw of the recall some years earlier, yet the bus had not been presented to the manufacture for the corrective fix to be applied, It can be reasonably inferred, when viewing this evidence in favor of the Plaintiff, that Defendant Union also knew, or should have known of the defect, but nonetheless, it failed to investigate, disclose or argue the fact that the bus was defective. This arguable breach of duty gives rise to a substantial reason to believe that the Union contributed to an erroneous outcome of the arbitration process, and the erroneous termination of the Plaintiff.

Specifically, the particular bus driven by the Plaintiff, VIN 1HNBAZRP8MH283162, Model 3700 International Engine, built on March 30, 1990, and sold to Laidlaw Transit, Inc. Exhibit 1. A recall notice was issued in accord with a National Highway Traffic Safety Administration (NHTSA) recall No. G-95506 in August of 1995, indicating problems with the accelerator pedal. Exhibit 2. It indicates that the accelerator pedal would not readily return to the idle position should a band throttle cable that passes through a retainer works its way through a slot in a retaining plastic grommet, and should this happen:

... the accelerator could stick in the applied position

without prior warning. Under these circumstances, the accelerator pedal would not readily return to the idle position. This could potentially affect the operator's ability to control the vehicle and could possibly result in an accident causing personal injury or property damage.

[Emphasis in original]

The record shows this kind of defect is exactly consistent with that the Plaintiff stated:

Q. And that's the point at which the bus began to accelerate because the accelerator had stuck?

A: Yes. The time the bus start accelerate out of control. And. then tell. me what happened as the bus began to accelerate out of control?

A: When the bus staff accelerate out of control, now I start to push brake. [Deposition. of E. Emrnanuel, page 5, line 4-11]

And further, in the statement the Plaintiff submitted to Laidlaw, he stated:

When I straightened the bus out the lane and pushed the accelerator the bus went out of control.

[Deposition Exhibit #3]

And still further, in the Police report based on the Plaintiff's statements is found:

Eugene Emmanuel, a bus dryer for Laidlaw Transit,

who stated. that the bus he was driving (no passenger) went out of control. Mr. Emmanuel said he did not know why the bus accelerated after he stopped at a stop sign on Rivermoor Street.

In short, the description by the Plaintiff in various contexts matches perfectly with the description of the possible effects by the recall.

The record further indicates that the Defendant did not have the defect correct. Exhibit 3. Records dated as late a April 2004, obtained by the Plaintiff from the Manufacturer, indicates that the bus driven by the Plaintiff had not been presented for correction of the above defect.

Even if Defendant Union did not have actual knowledge, it had a duty to investigate and should have had knowledge. These records are readily accessible to anyone with a simple computer and. modem, commonly used and almost certainly obtainable by the Defendant. Through a series of simple steps, Plaintiff obtained these records via electronic databases maintained at various location. Exhibit 4.

Thus, as is evidence from all the above, this information was or should have been known to at least the mechanics who were co-members of the union and with whom the Defendant interviewed, but dismissed their testimony as disadvantageous to the Plaintiff for the Arbitration. (Deposition of Richie Reardon, page 44 lines 2-21]. This information was also known or should have been known to Scott Hanon when he testified at the Arbitration Hearing that the accelerator and brakes had been working properly. In fact, the

Arbitrator based her decision a large part on Scott Hanson's testimony and found "(A)fter completing his review of the equipment and the maintenance records for the bus in question," there was no mechanical fault.

According to Mr. Roland Smith, the union steward, he personally informed Mr. Reardon that there was indeed another bus driver who experienced the same problem in a bus of the same type as that driven by the Plaintiff. Even with this information in hand, Mr. Reardon failed to investigate, disclose or argue that during Arbitration. [Deposition of Roland Smith, Page 40; Deposition of Benoit Eerie, Page 55-57]. This shows that the Union had, or should have had notice, of other accidents of the same type, and other reason for the accident other than an operator error by the Plaintiff.

If the Defendant knew this information and did not use it in the grievance procedure or in the Arbitration Hearing, instead relying on their alternative and unfounded. theory, the standard of the duty of fair representation of the Union's actions being arbitrary, discriminatory or exercised in bad faith would have been met. If the Defendant did not know this information and did not conduct an investigation to obtain the information then the standard of the duty of fair representation of the Union's actions being arbitrary, discriminatory or exercised in bad faith would have been met.

B. The Alternative Theory of the Defendant's at the Arbitration Hearing.

The duty of fair representation protects union members from arbitrary, discriminatory or bad faith treatment.

The Defendant's position is that since the Business Agent presented a plausible theory to the Arbitrator that the Plaintiff could not be fired because the collective bargaining agreement stated that the company had twenty (20) days after the incident to terminate the employee. And since it presented an alleged plausible theory the Union did not act in an arbitrary, discriminatory or bad faith manner.

The Defendant, however, showed no basis for the presentation of this theory to the Arbitration as to why it would be a plausible theory. The Union presented no case law to support its belief that twenty days means twenty calendar days. Further, the Union put on no case to support its assertion. The Union failed to refute the position that the Union was unavailable to the employer's contacts during that period, of time and the Union failed to refute that the delay in holding the meeting was chargeable to the Employer. The Arbitrator states: "Nor does it [the Union] assert that the employer should have notified the Grievant [Plaintiff] and the Union of its decision to discharge prior to their meeting [of August 23, 2000]." Arbitrator's Decision, page 13. Finally, in a bit of irony, the Arbitrator concludes that the passage of time did not affect "the Union's assertion that the passage of time affects its ability to investigate the accident." Ibid. There is clear evidence that though the Union presented an alternative theory of the case it likewise presented no evidence, no authority for its stance, and no plausible explanation of its theory for the "timeline" theory.

The Defendant in its Motion for Summary Judgment asserts that the Plaintiff is not the standard applied in

duty of fair representation cases, that "the Plaintiff espouses the novel proposition in this litigation that the duty is breached whenever the union determines what the union considers a more plausible theory to pursue at the arbitration, follows that theory, and subsequently loses." Aside from the fact that this is a complete misrepresentation it is clear from the Arbitrator's decision that the Defendant lost this theory because of the reason espoused by the Plaintiff no presentation of witnesses, no refuting of Employers evidence, no investigation - regardless of which theory the Defendant presented. First of all, had the Defendant don any investigation it would have found plenty of evidence of the possibility of mechanical malfunction to challenge the at-fault designation. Second, had the Defendant presented this evidence at any point of the grievance proceduref n1 to the Employer or to any fact finder the termination would not have proceeded or the Employer's arguments would have been hugely compromised. Thirdly, had. the Union done any investigation or presented any evidence supporting its alternative theory the termination would not have proceeded or the Employer's arguments would have been hugely compromised. Failure to do this was arbitrary or in bad faith.

Whether the Defendant's failure to present any case, evidence or case law, was arbitrary, discriminatory or in bad faith is a triable issue for the fact finder.

IV. CONCLUSION

The Plaintiff asserts that the new evidence discussed in this memorandum of law obtained after the filing of the

Defendant's Motion for Summary Judgment and planned to be used at trial has shown. that at the very least there is a genuine issue of fact and therefore the standard for a Summary Judgment has not been met by the Defendant. The new evidence also shows that observing the evidence in the best light of the Plaintiff, the Defendant breached its duty of fair representation by acting in an arbitrary, discriminating manner or exercised in bad faith, by not investigating and not obtaining this new evidence or interviewing witnesses and presenting this information to the Arbitrator. Further, the reliance on the alternative theory by the Defendant was equally arbitrary, discriminating manner or exercised in bad faith.

Therefore, the Plaintiff moves this Honorable Court to allow his Motion to Reconsider the Granting of the Defendant's Motion for Summary Judgment and Relief from the Order Granting the Summary Judgment.

Dated: April 26, 2004

Respectfully Submit

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Footnote

fn1 Please see Arbitrator's Decision, page 14, and above discussion.

No. 05-972

IN THE

Supreme Court of the United States

EUGENE EMMANUEL,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION 25,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

OPPOSITION OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION 25 TO THE PETITION FOR WRIT OF CERTIORARI

MATTHEW E. DWYER
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Dated: March 3, 2006

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether due process concerns about prejudice to a losing party, requiring notice to that party and an opportunity for it to present evidence are sufficient on this record to warrant the issuance of certiorari where the district court *sua sponte* reconsidered its ruling on a Motion for Summary Judgment and granted same, and where that action was upheld by the Court of Appeals for the First Circuit.

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INTRODUCTION

Defendant/Respondent International Brotherhood of Teamsters, Local 25, submits this Opposition Brief in response to the Petition for a Writ of Certiorari filed by Plaintiff/Petitioner Eugene Emmanuel (Case No. 05-972).

Petitioner argues that his due process rights were violated when the United States District Court for the District of Massachusetts allowed Defendant's Motion for Summary Judgment after initially denying it, a ruling upheld on appeal to the United States Court of Appeals for the First Circuit.

Petitioner's claim fails on the merits as detailed below and the Writ should therefore be denied.

STATEMENT OF FACTS[1]

The record shows that, beginning in 1999, Laidlaw employed the Petitioner, Eugene Emmanuel, as a school bus driver. Laidlaw's bus drivers are represented in collective bargaining by the Respondent, Teamsters Local 25 ("the Respondent" or "the Union"). On June 14, 2000, Petitioner was assigned to drive a school bus from Laidlaw's facility in West Roxbury, Massachusetts to another facility. According to Petitioner's averments, when he pulled the vehicle out of the parking lot, the accelerator stuck, causing the bus to increase its speed rapidly. As Petitioner was unable to control the bus due to an asserted failure of the brakes, it careened across the

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[1] The facts recited herein are taken from the decision by the United States Court of Appeals for the First Circuit, Emmanuel v. International Bortherhood of Teamsters, Local Union No. 25, 426 F.3d 416 (1st Cir. 2005).

street, through several bushes and a fence, ending in a ditch.

The collective bargaining agreement then in effect between Laidlaw and the Respondent allowed Laidlaw to terminate an employee for a "serious at-fault accident." Laidlaw determined that the accident was the Petitioner's fault and that it was serious enough to warrant dismissal. Petitioner grieved the termination through the Union. The Union's business agent (Ritchie Reardon) conducted an investigation and represented Petitioner in the ensuing grievance.

Laidlaw's representatives offered to reinstate Petitioner prospectively and treat the period of time since his termination as an unpaid suspension. Petitioner rejected this offer and insisted instead on arbitration. In preparing for the arbitration, Petitioner wanted the Union to argue that the accident had been caused by a mechanical defect, and he provided Reardon with a list of employees who he asserted would substantiate this claim. Reardon instructed Petitioner to have the employees contact him, reasoning that their willingness to contact the Union upon Petitioner's request would serve as a measure of their willingness to testify against their employer. After receiving no response from any of these employees, Reardon spoke to several mechanics employed by Laidlaw. These mechanics told Reardon that the accelerator and brakes on the bus were not defective. Reardon made a decision not to proceed under a mechanical defect theory due to the dearth of evidence to support that claim.

Reardon, instead, argued that Laidlaw had violated the Collective Bargaining Agreement by failing to impose the discipline within twenty (20) days of the date of the accident, as required by the contract. At arbitration, the arbitrator concluded that the accident

was serious and that Petitioner was culpable. She therefore sided with Laidlaw and dismissed the grievance.

Petitioner sued the Union for violating its duty of fair representation. He argued that the Union had not adequately investigated the mechanical defect claim and that the Union had acted irrationally in basing its arbitration case on the company's untimely imposition of the termination sanction. The Union moved for summary judgment. On November 17, 2003, the United States District Court for the District of Massachusetts denied the motion without opinion. However, on April 15, 2004, the court reconsidered the motion *sua sponte* and granted it, noting that the Union had not acted discriminatorily, arbitrarily or in bad faith. Petitioner moved for reconsideration, citing evidence about a mechanical defect in the bus model he claimed to have uncovered through an internet search after the initial November 17, 2003 ruling but prior to the April 15, 2004 ruling. This evidence was available on the internet prior to the arbitration. The district court denied Petitioner's motion for reconsideration.

Petitioner appealed, arguing, first, that summary judgment was improper, because there was an outstanding question of fact and, second, that the district court improperly denied his motion for reconsideration because the internet search results constituted "new evidence". The Court of Appeals for the First Circuit reviewed the summary judgment record *de novo* and decided that the Union had properly investigated the mechanical defect theory and had made a rational argument to the arbitrator. Therefore, the court upheld the order of summary judgment in favor of the Union. As to the district court's refusal to allow Petitioner's motion for reconsideration, the appellate court held that the

district court had not abused its discretion, because the "new" evidence gleaned from the internet could have been discovered earlier in the exercise of due diligence.

Petitioner has now sought review in this Court by Writ of Certiorari. For the reasons stated herein, the Respondent respectfully submits that the Writ should be denied.

REASONS FOR DENYING THE WRIT

I. This Case Posits No Novel Question of Law.

In Celotex Corp. V. Catrett, this Court took note that "district courts are widely acknowledged to posses the power to enter summary judgment *sua sponte*, so long as the losing party was on notice that she had to come forward with all her evidence." 477 U.S. 317, 326 (1986). Citing Celotex, the First Circuit has held that a district court may grant summary judgment *sua sponte* as long as discovery has taken place and the court has given the losing party reasonable notice that it must come forward with evidence to support the "essential evidence of the claim or defense." Berkovitz v. Home Box Office, Inc., 89 F.3d 24, 29 (1st Cir. 1996). Petitioner argues that the District Court granted summary judgment to the Respondent *sua sponte* without giving Petitioner notice that it planned to do so and an opportunity to present its facts.

However, as Petitioner acknowledges in his Petition for Writ on Certiorari, this case does not involve a straight *sua sponte* grant of summary judgment, because there was a motion made for summary judgment by the Union. Petition for Writ of

Certiorari at 15 [hereinafter Pet.]. As such, the concerns that courts have regarding *sua sponte* grants of summary judgment are inapposite in this situation.

In Celotex, this Court noted that district courts have the authority to grant summary judgment *sua sponte*, so long as concerns about prejudice to the losing party were alleviated by giving that party notice and an opportunity to present its evidence prior to the grant. Celotex, 477 U.S. at 326. The First Circuit and other circuits have used this statement to create rules regarding *sua sponte* summary judgment requiring that such a grant not be made prior to discovery and that notice and an opportunity to present evidence be given to the potential losing party before summary judgment issues. E.g., Berkovitz, 89 F.3d at 29. Here, the facts show that in accordance with a precisely established procedural order and following the completion of considerable discovery the Union filed a Motion for Summary Judgment on August 26, 2003. The Petitioner, in response, filed a detailed memorandum opposing the Union's summary judgment motion. The District Court denied the motion on November 17, 2003 and then reconsidered the motion on its own, granting it on April 15, 2004. The Circuit Courts of Appeal are uniform in holding that such a situation satisfies concerns that the losing party have notice and an opportunity to present evidence before a *sua sponte* grant of summary judgment. E.g., First American Kickapoo Operations, L.L.C. v. Multimedia Games, Inc., 412 F.3d 1166, 1169-70 (10th Cir. 2005) (determining that no prejudice occurred and a *sua sponte* grant of summary judgment was permissible, because the losing party was on notice that it needed to provide all relevant evidence where a motion for summary judgment was made and denied and a later *sua sponte* grant of summary judgment was based on the same grounds argued in that motion.); Young v. City of

Providence, 404 F.3d 4, 13, 13 n.4 (1st Cir. 2005) (holding that where the losing party was on notice of an opposing party's motion for summary judgment and "had every incentive to present her best case in opposition to summary judgment[]" at that time, a later grant of summary judgment *sua sponte* following a denial of the motion was not made without notice and did not prejudice the losing party.); Cain v. Airborne Express, 188 F.3d 506, 1999 WL 717948, at *1 n.1 (6th Cir. Sept. 10, 1999) (Finding that because the losing party had notice and opportunity to present his evidence at the time of the motion for summary judgment, the later grant of summary judgment *sua sponte* did not prejudice him and was "harmless error".).

Here, Petitioner had adequate prior notice of the Union's Motion for Summary Judgment and took full advantage of the opportunity to present his evidence in opposition to the motion. The district court denied the motion with a single word but later reconsidered, granting summary judgment on the same grounds originally argued in the Union's motion. This series of events did not prejudice the Petitioner in any way. Therefore, this Court's expressed concern about *sua sponte* grants of summary judgment is fully satisfied on the instant record. Petitioner's stated concern that the First Circuit's decision will invite prejudice to future losing parties is thus wholly unfounded. In sum, no novel or important question of law is posed here, and this Court should decline to issue the Writ.

II. The Courts of Appeal Are Not Split on Any Question of Law Posed By This Case

Petitioner analogizes this case to a situation where a significant delay ensues from the point at which a party moves for summary judgment to the point that the court decides summary judgment. Pet. at 15-17. Petitioner claims to find that the Circuit Courts of Appeal are divided as to whether it is permissible for a court to wait an extended period of time before ruling on such a motion. Id. at 16. However, Petitioner is forced to acknowledge differences between this case and the undue delay cases that the circuits have decided, because here the district court did decide on the motion in a timely manner. Id. at 17. According to Petitioner, this case nevertheless involves undue delay, because of the period of approximately five (5) months between the district court's denial of the motion and its reconsideration and granting of summary judgment. Id.

Petitioner would prefer the idea that the courts of appeal have not yet addressed a situation like this one, but in fact some of them have encountered very similar facts. In Young, the First Circuit found no prejudice when the district court, after denying a motion for summary judgment in May, 2003, reconsidered and granted summary judgment *sua sponte* six (6) months later in November, 2003. Young, 404 F.3d at 13. Similarly, in First American Kickapoo Operations, the period between the denial of the motion for summary judgment and the supposedly *sua sponte* grant of summary judgment[2] was sixteen (16) months. First American

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[2] The Tenth Circuit in First American Kickapoo Operations appeared unsure whether the record in that case truly reflected a *sua sponte* action by the district court, as it just as likely could